United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1252

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P/S

TO BE ARGUED BY:
RUDOLPH E. GRECO, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DOCKET # 75-1252

-against-

JOSEPH DE SIMONE and LOUIS TONANI,

Defendants-Appellants.

- X

On appeal from the United States
District Court for the Eastern
District of New York

APPELLANT TONANI'S BRIEF

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UNITED STATES COURT OF APPEALS
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QUESTIONS PRESENTED

1. Was the Special U. S. Attorney legally authorized to prosecute the indictment herein?

2. Was restriction by the trial court of cross-examination of the government's major witness reversible error?

3. Did the trial court err in allowing the admission of inflammatory and prejudicial testimony?

TABLE OF STATUTES

Title 28, §515 a - Authority for Legal Proceedings - Commission, Oath and Salary for Special Attorneys.

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

Rule 26, Federal Rules of Criminal Procedure.

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- -XX

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

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JOSEPH DE SIMONE and LOUIS TONANI,

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APPELLANT TONANI'S BRIEF

PRELIMINARY STATEMENT

Louis Tonani appeals from a judgment of conviction entered on May 30, 1975 after a jury trial (Bramwell, J.) in the United States District Court for the Eastern District of New York and from denials of his motions to dismiss the indictment and to declare a mistrial. The appellant was convicted of four counts of collecting an extension of credit by extortionate means in violation of T-18, U. S. C. Section 894. Appellant was sentenced to four concurrent six year terms of imprisonment. Appellant is currently confined in New York for convictions under that State's Penal Law.

STATEMENT OF FACTS

On March 3, 1975 an indictment was filed against Joseph De Simone and Louis Tonani. On March 13, 1975 both defendants pleaded not guilty and the matter was set for a jury trial on March 17, 1975. On that date the defendants moved to dismiss the indictment attacking the authorization of James Dougherty, Special U.S. Attorney. The motion was denied later that day. On March 18, 1975, a jury trial commenced before Bramwell, J. which ended on March 27, 1975 in a verdict of guilty for Tonani on Counts 3, 4, 5 and 6 of the indictment 75 CR155 which were all the counts which applied to that defendant. On May 30, 1975 judgment of conviction was filed and Tonani was sentenced to 6 years' imprisonment on each of the four counts to run concurrently. All four counts were violations of Title 18 U.S. Code §894, collecting an extension of credit by extorniate means.

POINT I

THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENSE COUNSELS' MOTION TO DISMISS ON THE GROUNDS THAT THE SPECIAL U. S. ATTORNEY LACKED LEGALLY SPECIFIC AUTHORITY TO ACT AS A SPECIAL FEDERAL PROSECUTOR HEREIN.

On March 17, 1975 counsel for both defendants De Simone and Tonani jointly moved for dismissal of indictment 75CR155. The motion was based on the contention of the defense that the authorization of Special U. S. Attorney James Dougherty lacked specificity clearly mandated by Federal Law. 28 U. S. C. Section 515-a,

The trial court, after reading briefs and hearing the arguments of both sides, rejected the position of the defense and denied the motion to dismiss.

District Courts around the nation have issued a spate of decisions favoring both sides of the argument.

In the recent past, the Second Circuit Court of Appeals in the case of In Re Persico, by opinion rendered June 19, 1975, decided the issue in favor of the prosecution. Weinstein, J., specifically designated to write the opinion, gave a scholarly dissertation of the history of Special U. S. Attorneys. Your appellant most respectfully disagrees with the conclusion of that decision.

It is the contention of your appellant that the indictment here-

in should have been dismissed as requested because it was brought to the grand jury by an attorney who was not properly authorized to do so.

Your appellant respectfully asks this court to reverse the trial court's denial of this defense motion.

POINT TWO

CROSS EXAMINATION OF THE MAJOR GOVERNMENT WITNESS WAS RESTRICTED TO SUCH A DEGREE BY THE TRIAL COURT AS TO CONSTITUTE REVERSIBLE ERROR.

The case against Louis Tonani was built largely on the testimony of Steven Varga. Other government witnesses did little if anything towards the prosecution's efforts to convict Tonani.

Juanita Valdez testified on page 487 of the trial record that she never even saw Louis Tonani, that he never sold her drugs and that she never previously identified him.

John Esposito testified as to Louis Tonani's presence at an auto painting shop under his supervision but could never identify the man who seemed to be held there unwillingly. This failure to identify the "victim" was a gaping hole in the testimony offered by Mr. Esposito against Mr. Tonani.

The testimony of Celia Nicolina DeOlivera had nothing to do with Louis Tonani. At page 554 of the trial minutes she denied knowing him at all.

The testimony of F. B. I. Agent Dodson placed Tonani's prints on a rather innoccuous note and revealed the government's failure to analyze the handwriting on that note. This was somewhat effective but certainly not

the stuff of which foundations are made in building cases of this nature.

Ramon Cruz never identified Louis Tonani.

The testimony of the rest of the F. B. I. Agents was strong but necessarily limited in its effectiveness. They testified as to their investigation and electronic set ups. They testified that Tonani made self incriminating remarks. Once they testified that he offered to get back the car of Steven Varga. Anyone with Tonani's background would try to bargain his way out of an arrest even to the point of giving up what could be his own car to satisfy the F. B. I. The other statement that Tonani allegedly made was a promise to deliver some 200 kilos of cocaine to the F. B. I. That was so preposterous as to be laughable instead of damaging. Omagine 200 kilos of powder worth more than gold. Enough to fill a very large truck!.

The monitored conversations of Tonani with Varga were not enough in themselves to convict Tonani beyond a reasonable doubt. The key to Tonani's conviction was the testimony of Steven Varga who put things in perspective for the jury by providing a circumstantial background which tied in with the indictment herein. This is clear from a reading of Court Exhibit 13 which appears on page 1172 of the trial record. It's a note from the jury in deliberation which states: "In relationship to the definition of implicit threats, as the creation of fear in light of the surrounding circumstances, can surrounding circumstances be construed to mean events or conditions that existed or took place prior to the time of implicit threats?" The Court replied in the affirmative.

This question goes to the heart of Steven Varga's testimony which was the sine qua non of the government's case.

In view of the foregoing it becomes crucial for the defense to have been given great range in cross examining Mr. Varga about his background so as to develop for the jury his motivations for testifying and any coloration he may have been lending to the fact picture that he painted. This range was never permitted except in a minimal sense.

During this trial the area of promises made to Mr. Varga in return for his testimony was neglected because the trial court chose to restrict defense counsels' exploration therein. The government gives us the law and then the government does not let us use it. It's analagous to Queen Isabella giving Columbus three ships and then blockading his port of embarkation with her Spanish Armada, leaving Columbus to roam freely, about the confines of the bay. You can't discover the New World that way.

Federal case law is replete with important decisions in this area. It is well settled that a trial court has discretion in limiting the scope of cross-examination and just as well settled that excessive restriction of inquiry into areas such as prosecutorial promises given in return for testimony is constitutional and reversible error. Davis v. Alaska, 415 U.S. 308, Giglio v. United States, 405 U.S. 150, Smith v. Illinois, 390 U.S. 129, Greene v. McElroy, 360 U.S. 474; Gordon v. United States, 344 U.S. 414, Alford v. United States, 282 U.S. 687.

The case of United States v. Campell, 426 F 2d 547 sheds light on what should be considered by a court when it uses its discretion to limit cross-examination. In essence this decision says that a jury must have sufficient information about a witness to make a "discriminating appraisal" of his prejudices and motives.

In the matter at bar, I submit that the trial court did not allow enough cross-examination of Steven Varga to pass the "Campell" test and so this conviction should be reversed.

POINT THREE

THE TRIAL COURT ERRED REVERSIBLY ON TWO OCCASIONS BY ADMITTING INTO EVIDENCE INFLAMMATORY AND PREJUDICIAL TESTIMONY.

The testimony of John Esposito was highly inflammatory. The trial court wrongfully denied motions for mistrial by the defense at the end of said testimony.

John Esposito placed Louis Tonani in the "oven" or baking apparatus of his auto painting establishment. Mr. Esposito testified further that Tonani had a "gun" and that he was with two others and that another man with them was bound possibly with "handcuffs." What John Esposito did was to introduce the words "oven", "gun" and "handcuffs" into this trial. What he failed to do was to specify any date for this occurrence, identify any victim, or even state with certainty what time of day this took place or what length of time expired during these goings on.

Taking the testimony of John Esposito at face value, we are left with a horror story for the jury which was incomplete in every important detail save the fact that Tonani was there.

Appeals and written recreations of past events never truly measure up to what actually took place at the time it took place.

Justice fittingly allows for inferences to be drawn during the course of a trial. The road to such inferences must be well paved with logic. This was not that kind of a road; large crucial expanses of it were never

constructed.

A judge must judge, that is his often difficult function. Our law sets guidelines for the exercise of discretion herein. Rule 26, Federal Rules of Criminal Procedure. U.S. v. James, C.A. 2d, 1953, 208 F. 2d. 124. Awkard v. U.S. , C.A. 1965, 352 F. 2d. 641, 646.

In Michelson v. U.S. 1948, 69 S. Ct. 213, 218, 335 U.S. 469 it was stated: "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendants' evil character to establish a probability of his guilt."

Evidence of other crimes of a defendant has been held inadmissible. U.S. v. Nemeth, C.A. 6th, 1970, 430 F. 2 d 704. Smith v. Rhay, C.A. 9th, 1969, 419 F. 2d 160.

The trial court herein erred in not granting the defense motion for mistrial because the inflammatory and prejudicial nature of said testimony was not out weighed by its probative value.

The trial court erred similarly in admitting the statement of Louis Tonani to the F.B.I. to the effect that he could deliver 200 kilos of "coke" in some 48 hours.

Firstly, Louis Tonani was not indicted on cocaine charges. The statement could, of necessity, have no probative value in relation to charges of extortion brought against him.

Secondly, Joseph De Simone, the co-defendant of Mr. Tonani, was charged with cocaine offenses, but he didn't make the statement. The

jury was told to ignore that as to Mr. De Simone because presumably it would have no probative value against him.

What we are left with is a bombshell which was wilfully detonated for no good reason.

The prosecution, through an error of the trial court was allowed to achieve a conviction and win its war by the use of indiscriminate scattershot proof. It thus accomplished through generalities what it could not do by specifics; convictions were obtained through the improper creation of an onerous aura about the defendants. No one here was boxed in logically by facts and proof beyond a reasonable doubt. The convictions herein were obtained on the premise, propounded by the prosecution with the permission of the trial court, that "Where there's smoke, there must be fire".

For the aforesaid reasons your appellant contends that the trial courts' decision herein should be reversed.

CONCLUSION

By reason of the foregoing, your appellant respectfully submits that the trial court committed reversible errors and prays this Court for appropriate and just relief.

Respectfully submitted,

RUDOLPH E. GRECO, JR.
Attorney for Appellant, Tonani